Supreme Court, U.S.
FILED
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92-876

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT P. MACIARIELLO AND
ARNOLD ROWELL, Petitioners

v.

CITY OF LANCASTER, CITY OF LANCASTER POLICE DEPARTMENT, W.B. SUMNER, CHIEF OF POLICE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, PAUL S. PASKOFF, LANCASTER CITY ADMINISTRATOR, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, Respondents

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER AN INVESTIGATION BY POLICE OFFICERS INTO CORRUPTION WITHIN A POLICE DEPARTMENT IS ACTIVITY WHICH CONSTITUTES SPEECH AND IS THEREFORE PROTECTED BY THE FIRST AMENDMENT.

2. WHETHER A POLICE OFFICER WHO SUFFERS RETALIATION FOR FIRST AMENDMENT ACTIVITY MUST PROVE THAT HIS SPEECH WAS THE "BUT FOR" CAUSE OR ONLY A "MOTIVATING" FACTOR IN HIS DEMOTION OR TERMINATION.

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 18, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit decided on August 18, 1992 (No. 91-1268) is set forth in the Appendix at 36a-57a. The Order of the District Court for the District of South Carolina, Civil Action No. 3:90-664-17 is set forth at Appendix 1a-3a.

The corrected order of the District Court in Civil Action No. 3:90-664-17 is set forth in Appendix at 4a-14a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1992. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statute involved is Title VII of the Civil Rights Act, 42 U.S.C. Section 1983.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of The United States. The First Amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peacefully assemble, and to petition the Government for redress of grievances.

STATEMENT OF THE CASE

1. PROCEEDINGS BELOW

This action was brought seeking redress of violations of the First and Fourteenth Amendments to the United States Constitution and violation of civil rights under 42 U.S.C. §1983.

The petitioners are police officers who brought this action against their former employer, the City of Lancaster and the City of Lancaster Police Department, the chief of police and the city administrator for violation of their freedom of speech, expression and association under the First and Fourteenth Amendments, intentional infliction of emotional distress and violation of the public policy of the State of South Carolina

in connection with their demotions and terminations.

The complaint was filed in March of 1990. On December 19, 1990, the defendants filed their Motion for Summary Judgment as to all causes of action. The Honorable Joseph F. Anderson granted defendants' motion as to the claim of outrageous conduct, but denied the motion as to violation of First Amendment rights and violation of South Carolina public policy.

Citing two recent cases, defendants renewed their Motion for Summary Judgment on July 24, 1991. The plaintiffs responded and filed a cross motion for summary judgment on the First Amendment claim. The plaintiffs withdrew their action for violation of public policy.

The district court entered its order on October 7, 1991, denying both party's motions for summary judgment on the First Amendment claim.

On November 25, 1991, the District Court entered its corrective order certifying for interlocutory appeal the issue of whether the petitioners' actions were speech on a matter of public concern.

The Court of Appeals for the Fourth Circuit examined the speech and the qualified immunity issue. The court held that the investigation was not protected speech, the protected speech which did occur during the investigation was not the "but for" cause of the demotions, and even if it had been, the defendants were entitled to qualified immunity. The court granted summary judgment to the governmental entities on the ground that plaintiff had failed to show a pattern and practice of unconstitutional conduct, an issue which was not appealed, briefed nor argued by the parties.

2. FACTS[1]

In June of 1987 Maciariello and Rowell initiated an investigation into suspected evidence tampering by Captain Broach. They were each demoted two ranks as a result of their "allegations" against Broach. (App. 58a, 60a, 61a, 63a, J.A. 36-37). Rowell was demoted from Sergeant to Patrol Officer with a decrease in salary from $17,139.00 to $14,081.00. Maciariello was demoted from Lieutenant to Corporal with a decrease in salary from $19,822.00 to $15,537.00.

Sumner claims that he demoted Maciariello and Rowell for a number of reasons including their failure to report the alleged evidence tampering to him, for conducting an unauthorized investigation, because Rowell recorded a conversation with city judge, Helen

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[1] In the interest of brevity, only a portion of the record below has been reproduced in the appendix. "J.A." citations refer to the Joint Appendix submitted to the Fourth Circuit. "App." refers to the appendix herein.

Sowell, and for making allegations against Captain Broach. It is important to note that no written departmental policy existed concerning investigations of fellow officers and Sumner admitted he did not know if plaintiffs knew of his purported "unwritten" policy against such investigations. (J.A. 40:19-25 - 403:19). Nor was there a policy prohibiting employees from taping other employees.[2]

The incident which prompted the plaintiffs to conduct an investigation occurred in May of 1987. Rowell arrested Shawn Scott and charged him for driving under the influence. At the police department, Scott was given a breathalyzer test and was videotaped. Scott's sister, Susan Howle, worked as a dispatcher for the Lancaster police department. It was well known in the department that Broach was romantically

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[2]Defendants admitted that no such policy existed in their response to Plaintiffs' Request for Admissions.

interested in Howle. (App. 25a, 33a-34a, J.A. 98:16-20, 275:12-25). Rowell worked part-time at a florist and knew Broach frequently sent flowers to Howle. (App. 33a-34a, J.A. 332:23-25, 333:1-8). Rowell had also observed Broach "fondl[ing]" Howle (J.A. 296:1-5), "rubbing her back, shoulders, talking dirty to her, things of that nature." (App. 33a, J.A. 275:21-23).

Lancaster Municipal Court Judge Helen Sowell reported to Rowell that Broach had inquired into Howle's brother's arrest to see if he could get the charges dismissed. (J.A. 59). Meanwhile Howle pressured Rowell to help her brother on the charges as he was trying to join the National Guard which would be impossible with a DUI conviction. (J.A. 250:21-25 - 252:4). Broach approached Sowell on "several occasions" seeking to help Howle's brother. (J.A. 59). Rowell told Howle he would talk to the solicitor about the case. The solicitor agreed to nol pros the case on the

condition that the case could be re-opened if Scott failed to join the service and fulfill his obligation. (J.A. 252:10-15).

Rowell then met with Judge Sowell, to enter a nol pros on the ticket. Sowell admitted Broach had already approached her several times about having the Scott charges dismissed. (App. 34a-35a, J.A. 59). Sowell stated that Broach had told her that he had viewed the tape and that Scott was obviously drunk. (App. 35a, J.A. 254:2-24). Judge Sowell also told Rowell that she had advised Broach to "back off" and let Rowell handle his own case. (J.A. 59). Rowell stated to Judge Sowell that he suspected Broach had tampered with the tape. (J.A. 61). Judge Sowell replied that she did not think Captain Broach would do that, that she "did not want to get involved in his allegations concerning Broach altering the Scott tape" and to "keep [her] out of this." (J.A. 61). After his conversation with Judge Sowell, Rowell reported his suspicions to his

Lieutenant -- Maciariello.[3] Sumner admits that Rowell was following his chain of command in doing so. (App. 20a-21a, J.A. 436:5-25 - 439:9). Maciariello, too, became concerned about the impropriety of Broach's attempts to interfere with another officer's case and the possibility of evidence tampering. However, Maciariello instructed Rowell to investigate the matter further before reporting his suspicions to anyone in the command staff. Broach was under investigation by SLED for sexual harassment at the time[4] and Maciariello did not wish to compromise the investigation

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[3]Appellants claim that "The basis for Rowell's fanciful assumption [that Broach had tampered with the tape] was nothing more than his unsubstantiated belief that Broach was infatuated with Howle." (Appellants' Brief p. 6) However as illustrated by the discourse between Judge Sowell and Rowell, he had more than adequate reasons to suspect Broach of misconduct -- reasons which had been reported to him by a municipal judge.

[4]The Sled investigation into Broach's alleged sexual harassment of a fellow officer was coinciding with the investigation into evidence tampering against Broach. (J.A. 159:5-16 274:3-15).

by additional allegations against Broach which may not be true. Maciariello and Rowell then initiated an investigation for the purpose of determining whether Broach had engaged in any wrongdoing. In essence they were attempting to establish or refute the existence of probable cause to believe that Broach had improperly interfered in the Scott case. (J.A. 285:8-18) During the investigation, the plaintiffs reviewed the Scott DUI videotape and discovered that the picture was missing. Only the sound remained. On or about June 16, 1987, Maciariello and Rowell consulted Captain Bailey who was in charge of the evidence room and Internal Affairs. (J.A. 57-58). Bailey told the plaintiffs that at Broach's request, he had given him the video from the evidence room. (App. 30a, J.A. 32). A review of the evidence log revealed that Broach had failed to sign out the video -- a violation of departmental policy. (J.A. 261-262) The plaintiffs continued their investigation. They

consulted a video expert, McGuirt, owner of Hi-Tech Video, who confirmed that the picture could easily have been erased leaving only the audio. Assistant Chief Harris overheard the plaintiffs discussing their investigation of Broach approximately two months later and questioned them about the matter. Harris requested that Bailey conduct an internal affairs investigation, but because he witnessed Broach remove the tape from evidence, Bailey declined to investigate the matter. Bailey then met with Sumner and Harris. The three agreed that SLED would conduct the investigation. However, the investigation was finally conducted, not by SLED, but by Lieutenant Balkcum of the detective division. Bailey was never informed that SLED would not be investigating, nor was he ever told why Balkcum had been selected as the investigator. (App. 30a-32a, J.A. 58-59).

During his investigation, Balkcum never questioned Maciariello about his involvement

in the matter. (J.A. 93:15-21). Balkcum questioned McGuirt who said that, in his opinion, the tape had been tampered with. McGuirt's statement to Balkcum did not appear in the final report.(J.A. 30-35). Balkcum questioned Broach who admitted that he had asked Bailey for the tape but denied that he ever actually removed the tape from evidence. (J.A. 30). Captain Bailey gave Balkcum a statement that he had given the Scott tape to Broach. However, after completing his investigation, Balkcum concluded Broach had not tampered with the evidence.[5]

Maciariello and Rowell were demoted as a result of their allegations against Broach.

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[5]Defendants have alleged that Broach passed a polygraph but same was never made a part of the record. Defendants further contend in their brief before the court of appeals that "the polygraph results were conclusive that Broach was telling the truth when he stated that he did not even view, much less tamper with, the Scott video." (Appellants' brief at p. 7) However, the polygraph report indicates that Broach was never asked whether he checked out the tape from the evidence room or whether he viewed it.

Sumner claimed they should have reported their suspicions. However, Sumner admits that Rowell did inform his superior, Lieutenant Maciariello of his suspicions. (App. 20a-21a, J.A. 436:10-25 - 437:3). Maciariello and Rowell also informed Captain Bailey of their suspicions. (J.A.32). Plaintiffs complained about their demotions to the City Administrator, Paskoff, and attempted to resign in his office by placing their badges on his desk and stating that they did not need to work for the city under those circumstances. (J.A. 104:1-25 - 107:19). Paskoff then wrote a memo to the chief advising him that the plaintiffs' attempted resignations did not comply with city policy and that they should be considered active employees. (J.A. 387:12-25 - 392:19). Neither Paskoff nor Sumner advised plaintiffs that their resignations were ineffective. (J.A. 405:4-25 - 407:9). Plaintiffs, believing they had resigned, did not report to duty and were

thereafter terminated. (J.A. 405:25 - 406:25). The official reason for the termination was for "unexcused absence," notwithstanding Maciariello and Rowell could have resigned in other than good standing with the department in the manner in which they attempted to resign. (J.A. 433). Sumner admitted that the terminations of the plaintiffs were unnecessary. (App. 19a, J.A. 432:19-25 - 433:9).

Thereafter, plaintiffs filed grievances over their demotions. The grievance committee recommended that the demotions be reversed. The committee specifically found that there was no malicious nor devious intent on the part of Maciariello in his attempt to have a rumor, which was hearsay, checked out before reporting it. (J.A. 434:8-18). The committee further found that Rowell followed his chain of command by reporting his suspicions to his lieutenant. Paskoff and City Council ruled that the demotions should stand. This action

followed.

REASONS FOR GRANTING THE WRIT

1. In deciding that investigative activities by police officers into departmental corruption is not speech protected by the First Amendment, the Fourth Circuit Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

2. In deciding that investigations into police corruption by employee police officers is not an activity protected by the First Amendment, the Court of Appeals rendered a decision in conflict with the decision of the Eighth Circuit court of appeals on the same matter.

3. In determining that the protected speech must have been a "but for" cause of the discharge or demotion, the Court of Appeals rendered a decision which directly conflicts with this Court's decision in Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274

(1977) holding that plaintiff need only show that his First Amendment conduct was a "substantial factor" or "motivating factor" in the resulting punishment.

ARGUMENT

A. THE COURT OF APPEALS ERRED IN HOLDING THAT AN INVESTIGATION INTO POLICE CORRUPTION BY POLICE OFFICERS IS NOT SPEECH OR EXPRESSION PROTECTED BY THE FIRST AMENDMENT

Freedom of speech and expression provided for in the First Amendment of the United States Constitution is one of the most important and fundamental rights guaranteed to American citizens in order to insure protection against the abuses and excesses of their governmental officials. Nowhere is this right more important than in the area of police misconduct because there the opportunity for individual, as well as collective, oppression is tremendous.

The Court of Appeals' decision contradicts the language of this Court in Connick v. Myers, 461 U.S. 137, 103 S.Ct. 1684

(1983) and Texas v. Johnson, 491 U.S. 397 (1989) Although this Court has not addressed the specific issue of whether investigations by police officers into suspected criminal conduct of their colleagues or superiors are protected the First Amendment, it has indicated that where public employees "seek to bring to light actual or potential wrongdoing or breach of public trust," by governmental officials, those activities will be protected. Connick v. Myers, 461 U.S. 137, 103 S.Ct. 1684 (1983) Maciariello and Rowell were attempting to do just that - bring to light evidence tampering by their Captain.

The Fourth Circuit, in a strained opinion, determined that while the investigation *itself* was not protected speech, the investigation *involved* protected speech. However, that court determined that this speech was so minor that "no reasonable trier of fact could find the speech a "but for" cause of the demotions." (App.51a)

There are two errors lurking in this analysis. First, The Fourth Circuit based its decision that the investigation was not protected by the First Amendment upon the premise that the investigation was "secret." (48a) It is true that the plaintiffs conducted a discreet investigation. However, this Court has held that private conversations on matters of public concern are entitled to the same First Amendment protection as are those made public. Givhan v. Western Line Consolidated School, 439 U.S. 410, 99 S.Ct 693 (1979); Rankin v. McPherson, 438 U.S. 378, 107 S.Ct. 2891 (1987). It is undisputed that Maciariello and Rowell discussed their suspicions with a city judge, with Captain Bailey, who supervised the evidence room and, of course, with each other. Therefore, the court of appeals not only mischaracterized the plaintiffs' activities as secret, but also misapplied the law, even if their investigative activities had been secret, or

"private." Givhan, *supra*. Furthermore, it is clear from the record that Sumner demoted the plaintiff's because of their "allegations" against Captain Broach. (App.60a, 63a)

Second, the dichotomy which the court of appeals attempts to establish between the investigation as a whole, and the activities pursued during the investigation, is spurious. The joint investigation could not have taken place without communication between the plaintiffs. There is simply no logical way to separate the investigation from the speech it encompassed.

The term "speech" in the First Amendment has been expanded by this Court to include expression that is meant to convey a message. For example in Texas v. Johnson, 491 U.S. 397 (1989), the Court ruled that burning a flag in the midst of a demonstration constitutes a form of speech that must be protected. However, the holding of the Fourth Circuit is tantamount to declaring that the act of

burning the flag is not speech, but setting a match to it is. And that lighting a match is so minor that it could not be the "but for" cause of punishment for burning the flag. Just as one has to apply fire to the flag to burn it, speech is necessary to conducting an investigation. Thus, just as flag burning expresses an opinion or belief, so does a criminal investigation. It cannot be seriously maintained that if an American is arrested while holding a match to the flag, but before the flag has been consumed by fire, that he is not entitled to invoke the protections of the First Amendment. It is equally clear that a police officer who is prohibited from completing a private investigation into suspected evidence tampering in his department, and is then demoted and fired as a result of the allegations he made against the suspected fellow officer has also suffered a violation of his First Amendment rights.

The court of appeals inferred from the

evidence that the plaintiffs were demoted for "not stating their suspicions to someone in authority." (App. 50a) Although the court acknowledged that plaintiffs did report their suspicions to Judge Sowell, it determined that the plaintiffs "were not demoted for revealing the possible evidence tampering to Judge Sowell, but rather for surreptitiously taping a conversation with her." (App. 50a) In so finding, the court decided a material issue of fact contrary to the assertions of the plaintiffs at both at trial and the appellate levels. (Appellee's Brief p. 11). 11) And such a finding directly contradicts Sumner's memoranda to Maciariello and Rowell which specifically stated:

> [i]n light of these reprimands and findings by the Internal Affairs Division of the Lancaster Police Department <u>regarding your involvement in the allegations brought</u> by Sergeant Arnold Rowell

against Captain Robert L. Broach, I have no choice at this time but to demote you... (60a,63a)(emphasis added)

Rowell received a similar memo containing almost identical language. Furthermore, the text memo itself clearly reveals the real purpose of the internal investigation into the allegations of evidence tampering:

> After reviewing the Internal Affairs investigation report regarding your allegations against Captain Broach, I agree with the findings of the report that <u>your</u> conduct in this matter was both unprofessional and devious. (App.61a, 62a)(emphasis added)

Clearly, the plaintiffs were the target of Balkcum's investigation, not Broach. And equally clear is that the demotions resulted from the plaintiffs' allegations against Broach, not their alleged failure to inform

someone in authority.

In making these findings of fact contrary to the assertions of the plaintiffs, who are entitled to every inference in a motion by the defendant for summary judgment, the court of appeals usurped the primary function of the jury. Moreover, the weight of the evidence supports plaintiffs' contention that they were, in fact, demoted for their allegations of misconduct against Broach, just as Sumner stated in his memo.

Even if plaintiffs had been demoted for failing to report their suspicions, this Court has held that American citizens have the right to not speak at all. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)(children in public schools could not be forced to pledge allegiance to the flag). However, the Fourth Circuit's opinion would require police officers who have mere suspicions of criminal activity in their departments to immediately report those

suspicions to their superiors, even if it is those very superiors whom the officers suspect of criminal activity, and even if they have no concrete proof of their suspicions.

Finally, the court of appeals determined that even though Chief of Police Sumner admitted that plaintiffs' activities in no way disrupted the normal operation of the police department, the "potential" for disruption was sufficient to outweigh the plaintiffs' First Amendment rights. (App. 55a-56a) This Court has expressly rejected this argument. In Texas v. Johnson, *supra*, Texas claimed that its interest in preventing breaches of the peace justified Johnson's conviction for burning the flag. However, the state conceded that no breach of peace occurred. Rather, it argued that persons offended by such conduct may be presumed to disturb the peace. This Court declined to accept that argument declaring that

> [o]ur precedents do not countenance such a presumption. On the contrary,

> they recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' Texas, *supra*, at 109 S.Ct. 2541 citing Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949)
>
> ***
>
> To accept Texas' argument that it need only demonstrate 'the potential for a breach of the peace,' and that every flag-burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do. (emphasis added) Texas at 109 S.Ct. 2542.

The court of appeals thus erred when it held that "[w]hether there was any concrete evidence that morale was disrupted or not, the potential for disruption is self-evident." (App. 56a)

The Court went on to find that plaintiffs had engaged in some protected speech - their conversations with each other and Judge Sowell - but that those conversations were not the "but for" cause of

their punishment. However, if the court had concluded, as it should have, that the investigation as a whole was entitled to First Amendment protection, then the analysis would have to be quite different.

It is for this important reason that the Court should review this issue to decide if First Amendment protection should be given to the activity engaged in by Maciariello and Rowell. It is important to remember that the two officers were conducting the investigation for the purpose and with the intention of presenting that information to the proper authorities. And although the court of appeals' decision seems to be largely influenced by its finding that the plaintiffs were motivated by dislike for Broach, there is evidence in the record that plaintiffs' suspicions were aroused not by dislike, but by Broach's relationship with Scott's sister, Howle.

To allow the officers to be punished for

this type of activity, particularly where it is undisputed that the investigation resulted in no adverse affect on the department, is to extend *carte blanche* authority to the Chief of Police of Lancaster to act as a censor.

With regard to investigations generally, this court has held that access to events which concern the public is crucial to the press to carry out its function. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). The Court, in Richmond, said, "It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a `right of access' or a `right to gather information,' for we have recognized that `without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 577. Although the concern in Richmond was freedom of the press, it follows that police officers who attempt to gather information of public corruption should

be afforded at least as much protection as the press. It is axiomatic that where citizens are prevented from gathering information about important issues and ideas, they are likewise prevented from expression on those ideas.

B. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THAT OF THE EIGHTH CIRCUIT AND TWO DISTRICT COURTS ON THE IDENTICAL ISSUE

In Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983), the Eighth Circuit Court of Appeals held that a state trooper's transfer was at least "indirectly traceable to [his] various speech-related accusations and investigations regarding" a fellow trooper's son's suspected drug trafficking." 714 F.2d at 1421 (emphasis added). The Eighth Circuit has thus acknowledged that a police officer's informal investigation is, under certain circumstances, protected by the First Amendment. The Hughes court decided however, that substantial dissension had resulted from Hughes' investigation and that it was that dissension which motivated his transfer, not

the investigation itself.

Two district courts have also opined that a police officer's investigation of a fellow officer is protected by the First Amendment. Carey v. City of Fall River, 708 F.Supp. 431 (D.Mass. 1988)("The court continues to believe that retaliation against a police officer for conducting an investigation may abridge his First Amendment right to free speech in certain circumstances. This is, apparently, a novel theory."); and Abernathy v. City of Cartersville, GA, 642 F.Supp. 529 (N.D.Ga. 1986)("A claim of theft by high police officials is certainly within the area of 'public concern' elucidated by Connick, and the efforts to report that theft must be protected.")

Because this Court has not decided the issue raised in this petition, and because the decision of the Fourth Circuit directly conflicts with that of other federal courts that have determined that such investigations

are protected, the Court should grant this petition.

C. THE COURT OF APPEALS ERRED IN RULING THAT PLAINTIFFS MUST SHOW THAT THE PROTECTED SPEECH WAS THE "BUT FOR" CAUSE OF THE DEMOTIONS AND TERMINATIONS

The court of appeals held that "[t]he protected speech must have been a 'but for' cause of the discharge or demotion." (App.50a-51a) In so holding it cited this Court's decision in Mt. Healthy v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977) However, Mt. Healthy expressly held that the burden upon the plaintiff is to prove that the protected conduct was a "motivating factor" in the employer's punitive personnel decision. Accordingly, the court of appeals held the plaintiffs to a higher standard of proof than this Court has required. Therefore, plaintiffs should be allowed to present their evidence to a jury to determine whether their "speech" was a motivating factor in their demotions and dismissals.

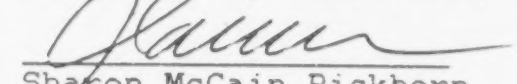
CONCLUSION

The Court of Appeals was so concerned with protecting the efficiency and integrity of the police department, even though plaintiffs' discreet investigation created no disturbance, that it ignored the free speech rights of the very individuals who are in the best position to expose police misconduct. It could do so only in the absence of guidance from this Court as to First Amendment protections afforded to law enforcement officers who attempt to expose criminal behavior by their superiors. Although this case arises within the context of a small southern municipal police department, its ramifications are enormous for the employees of such larger agencies as the FBI, CIA and DEA. The employees of such law enforcement agencies are entitled to gather evidence when corruption is suspected. To deny these individuals protection from retaliation will effectively eliminate the exposure of

government corruption from within the ranks. The Fourth Circuit has set a dangerous precedent which only this Court has the power and authority to reverse. Petitioners therefore respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, and set these important questions for plenary consideration.

Dated: November 13, 1992

Respectfully submitted,



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APPENDIX

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Robert P. Maciariello and Arnold Rowell, Plaintiffs, v. City of Lancaster, City of Lancaster Police Department, W.B. Sumner, Chief of Police, in his individual and official capacity, Paul S. Paskoff, Lancaster City Administrator, in his individual and official capacity, Defendants.	C/A No.: 3:90-664-16(H) ENTERED 10-7-91 ORDER

This matter came before the court on October 1, 1991, for consideration of the defendants' renewed motion for summary judgment. The court had previously heard, and denied, the defendants' original summary judgment motion.

The defendants' refiled motion was prompted by two recent decisions, *Epps v. Clarendon County*, ____ S.C. ____, 405 S.E. 2d

386 (1991); and *Dennison v. County of Frederick, Va.*, 921 F.2d 50 (4th Cir. 1990). The defendants contend that *Epps* requires a dismissal of the plaintiffs' claim for wrongful discharge in violation of public policy and that *Dennison* requires dismissal of the free speech claim.

Prior to the hearing, the plaintiffs conceded that *Epps* bars the public policy claim. The court thereupon heard argument from the parties on the question of whether *Dennison* precludes the plaintiffs' free speech claim.

After hearing from counsel, the court concluded that both motions for summary judgment should be denied and that the matter should be set for trial. Because the court did not afford counsel the opportunity to argue whether the doctrine of qualified good faith immunity protects the defendants in this action, the court indicated that it would review the matter again on the briefs and

issue a written order as to this defense.

Subsequent to oral argument, the court has reviewed the positions of the parties, as set out in their memoranda, regarding qualified good faith immunity. After reviewing these memoranda and the pertinent legal authorities, the court concludes that the defense does not pertain to this case. The defendants contend that the law regarding retaliation for First Amendment activity is not clearly established. The court disagrees and for this reason, the defendants' motion for summary judgment insofar as it is based on the qualified good faith immunity defense, must be denied.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

October 4, 1991
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Robert P. Maciariello and Arnold Rowell, Plaintiffs,	)	C/A No.: 3:90-664-17
v.	)	ENTERED 11-26-91
City of Lancaster, City of Lancaster Police Department, W.B. Sumner, Chief of Police, in his individual and official capacity, Paul S. Paskoff, Lancaster City Administrator, in his individual and official capacity, Defendants.	)	CORRECTIVE ORDER

As initially filed, this action asserted claims pursuant to 42 U.S.C. § 1983 and two state law claims for outrageous conduct and violation of public policy. The only claim remaining is the plaintiffs' claim for violation of their rights under the First Amendment to the United States Constitution. The parties filed cross motions for summary

judgment as to the First Amendment claim. Both motions were denied. In denying defendants' motion for summary judgment, the court ruled adversely to the defendants with respect to their qualified good faith immunity defense. Defendants have recently filed an appeal of that portion of the court's order pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

Two additional motions have now been filed; plaintiffs have moved for reconsideration of the denial of their motion for summary judgment, and defendants have moved for the court to certify the remaining issues for interlocutory appeal.

Plaintiffs' motion for reconsideration raises no issues which were not considered by the court in its earlier decision to deny the motion. Accordingly, the motion for reconsideration must be denied.

In seeking to have the court certify the remainder of this case for appeal, defendants point out that judicial economy will be

promoted by such a procedure. The defendants reason that, because an appeal will be taken in any event, and because the remaining issues in this case presents novel questions of law which will probably need to be ultimately resolved in a second appeal, judicial economy would be promoted by allowing all issues to be appealed at once.

As noted above, the only cause of action remaining in this case is the plaintiffs' claim for violation of their First Amendment rights. As to this claim, issues to be decided include: 1) whether the conduct of the plaintiffs involve speech on a matter of public concern, and (2) if such conduct is protected speech, whether the interest of the police department and controlling such investigations outweighs the interest of the employees in conducting such investigations. *Jones v. Dodson*, 727 F.2d 1329, 1334 (4th Cir. 1984); *Connick v. Myers*, 461 U.S. 138, 150 (1983).

Defendants argue that in denying defendants' motion for summary judgment, the court implicitly decided these two legal issues adversely to the defendants and that the court's ruling on these two issues should be certified for appeal. However, because of the unusual nature of interlocutory appeals, the court is compelled to make it clear what was not determined by its ruling on summary judgment. Defendants contend that the alleged secret and unauthorized investigation conducted in this case was not "speech" but was "conduct" and was thus not within the protection of the First Amendment to the United States Constitution. Defendants rely upon *Dennison v. County of Frederick, Virginia*, 921 F.2d 50 (4th Cir. 1990).

In denying defendants' motion for summary judgment grounded upon the *Dennison* decision, the court determined that genuine issues of material fact exist regarding the speech versus conduct issue, and summary judgment is

therefor inappropriate. However, if it is ultimately determined that what occurred her does constitute speech, then the speech involved did touch on a matter of public concern. An issue is of public import if it concerns the community. *Connick*, 461 U.S. at 146. In investigating and revealing possible evidence tampering, the plaintiffs were attempting "to bring to light actual or potential wrongdoing or breach of public trust" on the part of a fellow police officer. *Id.* at 148. In undertaking this investigation and revealing this issue the plaintiffs were not criticizing working conditions or internal department employment policy, but were attempting to point out "[i]nformation concerning the functioning of a segment of the [town] government [which] is of considerable public importance...." *Czurlanis v. Albanese*, 721 F.2d 98, 104 (3rd Cir. 1983). Thus, this court has determined that if the conduct of the plaintiffs does constitute speech, then

such speech is on a matter of public concern.

The court, however, cannot make a legal determination at this time as to whether the interest of the defendants in regulating the activities which occurred in this case outweigh the interests that the plaintiffs might have in asserting their free speech rights.

In *Joyner v. Lancaster*, 814 F.2d 20, 23 (4th Cir. 1987) *cert. denied*, 108 S.Ct. 102 (quoting *Connick*, 461 U.S. at 150), the court stated that this determination is made based on a sliding scale analysis of whether the employee's interest outweighs the "employer's interest in the effective and efficient fulfillment of its responsibilities to the public.'" At one end of the scale is placed "speech in the public interest by a public spirited citizen" which is entitled to greater protection than speech in the interest of the speaker." *Id.* At the other end of the scale rests "the interest of the employer in

maintaining efficiency in the rendition of public services." *Id.* This interest "will vary substantially with the nature of the employment relationship." *Id.*

Therefore, the second side of the scale takes into consideration the "nature of the employee's job in assessing the possible effect of his action on employee morale, discipline or efficiency." *Jurgensen v. Fairfax County, Virginia*, 745 F.2d 868, 880 (4th Cir. 1984). University professors and police officers are placed at opposite ends of this spectrum. Although "inhibition of academic freedom is strongly disfavored," the latitude of academicians is to be contrasted with the "discipline demanded of, and freedom correspondingly denied to policemen." *Id.* This determination is due to the importance given the necessary "close working relationships" found within police departments and the special nature of such agencies. *Connick*, 461 at 151; *Jurgensen*, 745 F.2d at 880. Thus, the

free speech rights of a police employee are not as expansive as those rights given to members of the teaching profession. *Id.*

The burden of proving that the government's interest exceeds the employee's interest lies with the employer. *Jones v. Dodson*, 727 F.2d 1329, 1334 (4th Cir. 1984). While a police officer's speech may be curtailed, he does possess some rights of free expression. *Jurgensen*, 745 F.2d at 880. His rights increase with the degree of public concern his speech addresses. *Connick*, 461 U.S. at 152; *Jones*, 727 F.2d at 1334. Therefore, if the speech is a private matter, a public employer is not required to "tolerate action which he reasonably believe[s] would disrupt [his office], undermine his authority, and destroy close working relationships....'" *Jones*, 727 F.2d at 1334 (citing *Connick*, 461 U.S. at 154). On the other hand, "expressive conduct, concededly disruptive to some degree, which touches directly upon matters of grave

public concern may not justify another discharge." *Jones*, 727 F.2d at 1334.

The *Connick* factors have also been set forth as follows:

(1) the need for harmony in the office or work space;

(2) whether the government's responsibilities require close working relationships to exist between the plaintiff and co-workers;

(3) the time, place and manner of the speech;

(4) the context in which the dispute arose;

(5) the degree of public interest in the speech;

(6) whether the speech impeded the employee's ability to perform his or her duties; and

(7) whether the employer has exercised the discretion necessary for the proper management of internal affairs and personnel decisions.

Although the court has found that if plaintiffs' investigation constituted speech, such speech would be a matter of public concern, genuine issues of material fact still remain as to many of the above factors. For

example, factor number three above (the time, place and manner of the speech) is not fully developed in the record before the court. For this reason summary judgment is inappropriate and a resolution of this issue must await further factual development.

If the defendants pursue their appeal of the qualified good faith immunity defense, the court will be required to stay this action during the pendency of the appeal. If the case is ultimately tried, the one issue of law recited above (that the "speech" involved a matter of public concern) might well present itself for resolution by the Fourth Circuit Court of Appeals. For this reason, the court concludes that defendants' motion for certification of this one issue is meritorious.

Pursuant to 28 U.S.C. § 1292(b) this court certifies that the legal issue discussed above involves a controlling question of law as to which there is substantial ground for

difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

It is further ordered that plaintiffs' motion for reconsideration of the court's denial of its summary judgment motion is denied.

This order corrects and supersedes the order dated November 15, 1991, which incorrectly stated that plaintiff had filed the motion to certify additional questions on appeal.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

November 25, 1991
Columbia, South Carolina

A I DON'T KNOW WHO KNEW ABOUT IT, SO I DON'T KNOW TO WHAT POINT IT COULD HAVE DISRUPTED. I DON'T KNOW.

Q CAN YOU TELL ME ANY WAY DURING THAT TIME DID IT DISRUPT THE DEPARTMENT TO YOUR KNOWLEDGE?

A DURING THE TWO AND A HALF MONTHS BEFORE?

Q BEFORE YOU WERE TOLD ABOUT IT.

A NO, MA'AM.

Q YOU DIDN'T SEE ANY DISRUPTION IN THE DEPARTMENT YOU CAN NOW SAY IT WAS BECAUSE OF THAT?

A I DID NOT SEE ANY.

Q YOU TESTIFIED IT WAS AFTER IT BECAME KNOWN IN THE DEPARTMENT THAT DISRUPTION OCCURRED?

A AGAIN, THE RUMORS THAT BEGAN TO OCCUR WHICH DISRUPTS THE ORDERLY OPERATION OF THE DEPARTMENT.

Q IN YOUR ANSWER TO QUESTION 16, AND THESE ARE AGAIN YOUR ANSWERS TO PLAINTIFF'S FIRST

SET OF INTERROGATORIES, I ASKED STATE THE REASONS FOR PLAINTIFF'S DEMOTIONS. YOU ANSWER THAT PLAINTIFFS WERE DEMOTED PRIMARILY BECAUSE OF THEIR FAILURE TO BRING TO THE ATTENTION OF THE CHIEF OF POLICE THEIR BELIEF THAT ANOTHER MEMBER OF THE POLICE FORCE HAD TAMPERED WITH EVIDENCE. THEY CONDUCTED THEIR OWN INVESTIGATION AND SECRETLY TAPE RECORDED AT LEAST ONE CITY EMPLOYEE...

***

A MR. ROWELL AND MR. MACIARIELLO WAS NOT TERMINATED AS A RESULT OF A MISSING TAPE OF A D.U.I., NO, MA'AM.

Q ARE YOU TAKING THE POSITION THEY WERE TERMINATED?

MS. EDWARDS: OBJECT TO THE FORM.

Q WERE THEY TERMINATED?

A IN MY MIND, YES, MA'AM, THAT THEY COULD NOT--WHEN THEY TURNED THEIR BADGES IN TO THE CITY ADMINISTRATOR, IN ORDER FOR THEM TO RESIGN IN GOOD STANDING, IT WOULD HAVE TO COME THROUGH THE DEPARTMENT HEAD, AND THAT DID NOT

OCCUR.

A SO IT'S YOUR POSITION THAT MR. MACIARIELLO WAS TERMINATED?

MS. EDWARDS: OBJECT TO THE FORM.

A IT'S MY POSITION THAT THEY DID NOT RESIGN IN GOOD STANDING AND THAT THE FAILED TO SHOW UP FOR THEIR APPOINTED HOUR OF DUTY, AND, THEREFORE, THEY WERE TERMINATED.

Q THAT IS MR. MACIARIELLO AND MR. ROWELL?

A YES, BOTH. THEIR APPARENT RESIGNATION TO THE CITY ADMINISTRATOR, IN ORDER FOR THEM TO HAVE RESIGNED IN GOOD STANDING, HAD TO BE DONE THROUGH THE DEPARTMENT HEAD.

***

Q I AM GOING TO SHOW YOU A MEMORANDUM THAT IS TO YOU FROM MR. PASKOFF AND IT'S DATED OCTOBER 6, 1987 AND ASK YOU IF YOU RECOGNIZE IT?

A YES, MA'AM.

Q THAT IS A MEMORANDUM YOU RECEIVED FROM MR. PASKOFF THE DAY FOLLOWING MR. MACIARIELLO AND MR. ROWELL'S ATTEMPT TO RESIGN TO MR.

PASKOFF BY PLACING THEIR BADGES ON HIS DESK?

A I CAN SAY THAT I RECEIVED THIS, BUT FOR ME TO SAY THAT IT WAS OCTOBER 6TH, I CAN'T TELL YOU THAT I RECEIVED IT OCTOBER 6TH. I DON'T KNOW IF HE PUT IT IN THERE LATE EVENING, OCTOBER, OCTOBER 6TH AND I GOT IT THE 7TH, I COULDN'T TELL YOU THAT, BUT I DID RECEIVE THAT.

Q PRIOR TO RECEIVING THIS MEMORANDUM FROM MR. PASKOFF, DID YOU REALIZE THAT MR. MACIARIELLO AND MR. ROWELL COULD NOT RESIGN IN GOOD STANDING TO MR. PASKOFF?

A DID I REALIZE?

Q YES, SIR. BEFORE MR. PASKOFF WROTE YOU THIS MEMO EXPLAINING TO YOU WHY THEY COULD NOT RESIGN. YOU DID?

A YES, MA'AM.

Q DID YOU HAVE A TELEPHONE CONVERSATION WITH HIM CONCERNING THAT ISSUE?

A I BELIEVE TO MY RECOLLECTION THAT -- I DON'T KNOW IF HE CALLED ME FOR SOMETHING AND WE HAD A CONVERSATION OR I CALLED HIM, BUT I

BELIEVE WE DID HAVE A CONVERSATION THAT IN ORDER FOR THEM TO RESIGN IN GOOD STANDING, IT HAD TO BE DONE THROUGH THE DEPARTMENT, OR SHOULD BE DONE THROUGH THE DEPARTMENT HEAD.

* * *

Q THEN WHY WERE MR. MACIARIELLO AND MR. ROWELL NOT ALLOWED TO RESIGN, EVEN IN BAD STANDING FOR THAT MATTER, TO MR. PASKOFF?

A WELL, IN MY OPINION THEY DID RESIGN TO MR. PASKOFF. IN MY OPINION THEY DID RESIGN TO HIM, AND I HAD NO KNOWLEDGE OF THE FACT THAT THEY EVEN HAD THAT IN THEIR MIND WHEN THEY LEFT MY OFFICE. I HAD NO OPPORTUNITY TO DISCUSS THAT WITH THEM. I MERELY FELT AT THAT TIME THAT THEY WERE DEMOTED. THEY WERE GIVEN DIRECTIVES WHEN TO REPORT BACK TO WORK AND AFTER THEY DID THAT, I SIMPLY WENT AHEAD AND TERMINATED THEM FOR THEIR FAILURE TO APPEAR.

Q WAS THAT EVEN NECESSARY IF THEY HAD ALREADY RESIGNED?

A YOU KNOW IT PROBABLY WASN'T NECESSARY. IT PROBABLY WASN'T NECESSARY.

* * *

Q DIDN'T MR. ROWELL, IN FACT, GO TO HIS NEXT IN COMMAND, HIS SENIOR OFFICER, AND REPORT HIS SUSPICIONS?

A I THINK THEY GOT TOGETHER AND THERE WAS NO REPORTING OF SUSPICIONS. I THINK THAT WAS A JOINT THING. MY OPINION IS THEY JOINTLY MADE THAT ASSUMPTION.

Q BUT DIDN'T IT INITIATE WITH MR. ROWELL'S SUSPICIONS AGAINST CAPTAIN BROACH?

A TO MY KNOWLEDGE THAT IS THE WAY IT STARTED.

Q HE REPORTED IT TO HIS SUPERIOR, WHO WAS HIS LIEUTENANT, BOB MACIARIELLO?

A YES. MA'AM.

Q MR. MACIARIELLO THEN DECIDED THAT THEY WOULD CHECK OUT THE RUMOR OR THE SUSPICIONS BEFORE REPORTING IT FURTHER, IS THAT YOUR UNDERSTANDING?

A APPARENTLY THAT IS WHAT HE DID.

Q WELL, THEN DIDN'T MR. ROWELL ACT PROPERLY IN REPORTING HIS SUSPICIONS TO HIS SUPERIOR

OFFICER?

A IF YOU WANT TO LOOK AT IT THAT WAY, YES, MA'AM.

Q WHY DID YOU FEEL IT WAS NECESSARY TO DEMOTE AND THEN TERMINATE MR. ROWELL?

A BECAUSE BOTH OF THEM -- IF YOU WANT TO USE THAT SYNOPSIS, THAT MR. ROWELL REPORTED IT TO THE LIEUTENANT. AS A LIEUTENANT HE SHOULD HAVE BROUGHT IT TO THE PROPER PEOPLE. THEY, IN TURN, DID NOT. "THEY" BEGIN ROWELL AND MACIARIELLO, THEN TOOK IT UPON THEMSELVES TO CONDUCT, THE TWO OF THEM, A TWO AND A HALF MONTH INVESTIGATION INTO ALLEGATIONS THEY THOUGHT SOMEBODY TAMPERED WITH EVIDENCE, AND I THINK THEY HAD A RESPONSIBILITY BOTH OF THEM AS SUPERVISORS. ROWELL WAS A SERGEANT.

Q EVEN THOUGH HE DID TAKE THE PROPER STEP AND REPORTED IT TO HIS NEXT IN COMMAND, YOU FELT THAT NOT GOING ABOVE THAT WAS GROUNDS FOR DISMISSAL, OR DEMOTION AND DISMISSAL?

MS. EDWARDS: OBJECT TO THE FORM.

A I FELT THAT THE TWO OF THEM, SGT. ROWELL

AND LIEUTENANT MACIARIELLO, BOTH WORKING ON THE SAME SHIFT, HAD SOME KNOWLEDGE OR SOME REASON TO BELIEVE IN THEIR MIND THAT THIS HAD OCCURRED, AND HE DID BRING IT TO HIS ATTENTION. HE THEN, IN TURN, THE TWO OF THEM THEN BECAME -- THIS IS WHERE IT MADE HIM WRONG -- THE TWO THEM INVOLVED IN CONDUCTING THEIR OWN INVESTIGATION OF AN OFFICER OF A CHARGE OF THAT NATURE FOR SOME TWO AND A HALF, THREE MONTHS WITHOUT ANYONE'S KNOWLEDGE.

Q DO YOU KNOW WHETHER MR. MACIARIELLO INSTRUCTED MR. ROWELL TO UNDERTAKE THAT INVESTIGATION AND TO ASSIST HIM IN THE INVESTIGATION OF MR. BROACH?

A I HAVE NO KNOWLEDGE.

Q WOULD IT MAKE A DIFFERENCE IF MR. ROWELL WAS UNDER ORDERS FROM HIS LIEUTENANT TO UNDERTAKE FURTHER INVESTIGATION OF THE MISSING VIDEOTAPE WITHOUT REVEALING HIS SUSPICIONS TO ANYONE ELSE?

A WELL, I CAN ANSWER THAT BY LIEUTENANTS OR CHIEFS OR NOBODY ELSE CAN MAKE ANYBODY DO

ANYTHING THAT IS A VIOLATION OF THE LAW WITHIN A DEPARTMENT, AND CERTAINLY I WOULD THINK THAT POLICE OFFICERS' SUPERVISORS WOULD -- SERGEANT AND LIEUTENANTS -- WOULD KNOW THAT ALL THEY HAD TO DO WAS REPORT THAT INCIDENT, AND THEY DID NOT.

Q IS THIS A VIOLATION OF THE LAW?

A NO. IT'S NOT A VIOLATION OF THE LAW NOT TO REPORT IT.

Q IF MR. ROWELL WAS UNDER A DIRECT ORDER FROM HIS LIEUTENANT TO ATTEMPT TO SUBSTANTIATE HIS SUSPICIONS, WOULDN'T HE BE OBLIGED TO COMPLY WITH THAT ORDER FROM LIEUTENANT MACIARIELLO?

A I HAVE NO KNOWLEDGE THAT LIEUTENANT MACIARIELLO GAVE HIM A DIRECT ORDER TO GO AND TAPE OR GO AND DO ANYTHING?

Q DID YOU ASK SGT. ROWELL IF HE WAS UNDER ORDERS TO ATTEMPT TO SUBSTANTIATE HIS SUSPICIONS?

A I DID NOT ASK MR. ROWELL ANYTHING.

Q DID YOU KNOW WHETHER MR. BALKCUM ASKED

HIM THAT QUESTION?

A I DON'T KNOW WHAT QUESTIONS WAS ASKED OF HIM.

* * *

A YES, MA'AM

Q ABOUT CAPTAIN BROACH AND SUSAN HOWELL HAVING AN AFFAIR?

A YES. I DON'T KNOW WHETHER HE WAS OR NOT, BUT SHE CAUGHT HIS FANCY TO SAY THE LEAST.

Q HAVE YOU HEAR RUMORS THEY WERE HAVING AN AFFAIR?

A YES, MA'AM. THERE WAS ALWAYS RUMORS. SUSAN ALWAYS WORKED FOR BROACH AND HE WAS ALWAYS TRYING TO HIT ON HER. IF ANYTHING ACTUALLY OCCURRED, I DON'T KNOW. I DIDN'T CARE. SO I DIDN'T DEAL IN WHETHER OR NOT BROACH WAS TRYING TO GO WITH SUSAN.

***

Q MR. ROWELL HAD SUSPICIONS ABOUT THE TAPE?

A YES, MA'AM. HE STATED TO ME THAT JUDGE SOWELL TOLD HIM THE CONVERSATION SHE HAD WITH BROACH. THAT BROACH MADE A STATEMENT THAT HE SAW THE VIDEO AND HE KNEW THAT SEAN WAS DRUNK, BUT HE WANTED TO KNOW IF SOMETHING COULD BE

DONE WITH THE CASE. SO WE, SGT. ROWELL AND MYSELF, GOT THE TAPE OUT OF EVIDENCE AND NOTICED THE CHAIN OF CUSTODY WAS BROKEN; BROACH'S NAME WAS NOT ON IT. AND WE VIEWED THE VIDEO OURSELVES, AND THE VIDEO STARTS UP WITH THE VIEW OF THE BREATHALYZER ROOM, THE DOOR OPENS AND YOU CAN HEAR MR. SCOTT AND SGT. ROWELL RIGHT OUTSIDE THE DOOR. AND BEFORE THEY ENTER, THE PICTURE GOES BLANK. THE AUDIO WAS STILL THERE, BUT THE PICTURE WAS GONE.

WE ASKED THE QUESTION OURSELVES HOW DID BROACH VIEW THE TAPE IF THERE WAS NO PICTURE ON IT, SO WE PUT THE TAPE BACK INTO EVIDENCE AND THEN WE STARTED INVESTIGATING TO SEE IF THE TAPE COULD BE ERASED IN THE VIDEO AND THEN AUDIO STILL LEFT ON THERE, AND I'M NOT AN EXPERT ABOUT V.C.R.'S SO I DIDN'T KNOW.

SGT. ROWELL DIDN'T KNOW, SO WE WENT OVER TO MR. MCGUIRT'S PLACE, HIGH TECH VIDEO. HE'S THE ONE THAT SOLD THE EQUIPMENT TO THE CITY, AND HE'S THE ONE THAT DOES ALL THE REPAIRS.

Q WHEN WAS THAT YOU WENT TO SEE HIM? WAS

THAT IN JULY?

A YES. I BELIEVE IT WAS IN JULY. WE ASKED HIM IF IT WAS POSSIBLE TO ERASE A TAPE, TAKE THE VIDEO OFF BUT LEAVE THE AUDIO THERE. AND HE SAID, YES, IT COULD BE DONE QUITE EASILY, AND HE EXPLAINED THE PROCESS HOW IT COULD BE DONE.

* * *

Q WHEN DID YOU FIRST LEARN THAT THIS VIDEO HAD NO PICTURE. DO YOU RECALL?

A IT WAS IN JULY, I BELIEVE, WHEN SGT. ROWELL WHO IS NOW ON MY SHIFT, CAME AND TOLD ME ABOUT A CONVERSATION HE HAD WITH JUDGE SOWELL ABOUT BROACH APPROACHING HER TRYING TO GET THE CASE NOL PROSSED, AND HE HAD SOME SUSPICIONS ABOUT THE TAPE.

* * *

A WE WENT TO PAUL PASKOFF'S OFFICE.

Q IMMEDIATELY FROM SUMNER'S OFFICE?

A YES, MA'AM.

Q WHAT HAPPENED AT THAT MEETING?

A WE TOLD PASKOFF WE DIDN'T AGREE WITH WHAT

WAS HAPPENING. WE TOLD HIM THAT WE WENT TO THE GRIEVANCE HEARING AND ALL THAT BIT.

Q WHAT DO YOU MEAN YOU WENT THROUGH THE GRIEVANCE HEARING?

A WE HAD A GRIEVANCE HEARING ON THAT. NO, I THINK IT CAME AFTERWARDS. YES, WE WENT TO PASKOFF'S OFFICE AND TOLD HIM WE DIDN'T AGREE WITH SUMNER'S COVERING THIS UP AND PUT OUR BADGES ON HIS DESK.

* * *

Q THIS STATEMENT SAYS MR. HOWARD TAPED ALL CONVERSATIONS WHICH TOOK PLACE IN HIS OFFICE.

A NO, MA'AM. THAT'S NOT CORRECT. BILL SUMNER TAPED ALL CONVERSATIONS THAT OCCURRED IN HIS OFFICE.

Q HOW DOES MR. HOWARD KNOW THAT?

A I DON'T KNOW HOW MR. HOWARD KNEW THAT. BILL SUMNER TOLD ME THAT HIMSELF.

Q BILL SUMNER TOLD YOU THAT HE TAPES ALL CONVERSATIONS IN HIS OFFICE?

A YES, MA'AM. THAT WAS THE SAME CONVERSATION ABOUT WHY I SHOULD BUY A TAPE

RECORDER.

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF
COUNTY OF YORK) T. J. BAILEY

AFTER BEING DULY SWORN, affiant deposes and states:

I am the former captain of detectives for the City of Lancaster Police Department. I am now employed by the City of Rock Hill Police Department. In September of 1987, I discussed with Sergeant Arnold D. Rowell and Sergeant Robert Maciariello an investigation which they were conducting into possible evidence tampering by Captain Robert Broach. The evidence involved a DUI videotape of Shawn Scott, whom Sergeant Rowell had previously arrested. On September, 9, 1987, Sergeant Rowell provided me with a written statement which outlined the investigatory process which he and Sergeant Maciariello had undertaken. As I was in (sic) the detective in charge of internal affairs at that time, Sergeant Rowell also requested that I initiate an internal departmental investigation into the matter. A

copy of the statement which Rowell gave to me is attached to this affidavit.

I informed Sergeant Rowell that while in charge of the evidence room, I had given the Scott video to Captain Broach and asked him to sign an evidence card. Because I had direct information relating to the allegations against Broach, I felt that it would be improper to personally conduct the investigation. Therefore, I met with Assistant Chief Harris and informed him that I could not be personally involved in the investigation as I was a potential witness. I then met with Chief Sumner and City Manager Paul Paskoff. After explaining the reason that I could not personally investigate the incident, it was mutually agreed by the three of us that the South Carolina Law Enforcement Division would undertake the investigation.

Approximately two weeks later I learned that Lieutenant Balkcum was conducting the investigation. I was not consulted regarding

Lieutenant Balkcum's involvement in the investigation, nor was it ever explained to me why the incident was not investigated by SLED.

I have personal knowledge of all the facts stated herein.

FURTHER AFFIANT SAYETH NOT.

_____
T. J. Bailey

SWORN TO BEFORE ME this

_____ day of _____, 199___.

_____
Notary Public for South Carolina

My Commission Expires:_____

Q WHY DO YOU THINK BROACH WOULD TAMPER WITH A PIECE OF EVIDENCE?

A PROBABLY HAVE TO BE A PSYCHIATRIST TO GET INTO BROACH'S MIND. BROACH IS A STRANGE PERSON. AS I SAID BEFORE, BROACH AND SUSAN HOWLE WERE EXTREMELY CLOSE, CLOSER THAN A LOT OF BROTHERS AND SISTERS. I DON'T KNOW WHETHER YOU HAVE TALKED WITH MS. HOWLE YET, BUT SHE WILL NOT SAY A BAD THING AGAINST BROACH, BUT SOME OF THE THINGS THAT I HAVE SEEN BROACH DO AROUND HER, MY WIFE WOULD PROBABLY SLAP ME IF I DID IT.

Q LIKE WHAT?

A HE WAS FOREVER -- WELL, HE FOREVER HAD HIS HANDS ON HER, RUBBING HER BACK, SHOULDERS, TALKING DIRTY TO HER, THINGS OF THAT NATURE.

Q HOW DID SHE RESPOND?

A SHE SEEMED TO LIKE IT.

***

Q THERE WAS SOMETHING SOMEWHERE I READ IN HERE OR IN ANOTHER DOCUMENT, YOUR COMMENTS

ABOUT SUSAN HOWLE, YOU KNEW THAT SHE GOT FLOWERS FROM BROACH FREQUENTLY.

A YES, MA'AM.

Q HOW DO YOU KNOW THAT?

A MOST OF THE TIME, THEY WERE SITTING ON THE DESK, AND I HAD A PART TIME DELIVERY JOB WITH ONE OF THE FLORISTS UP THERE. AND CAPTAIN BROACH'S HANDWRITING IS ONE OF A KIND, YOU CAN'T MISTAKE IT.

Q SO THAT'S HOW YOU KNEW THEY WERE FROM HIM?

A YES. THAT'S HOW I KNEW.

***

A *** I FINALLY WENT TO THE ASSOCIATE JUDGE'S OFFICE ---

Q THIS IS MS. SOWELL:

A MS. SOWELL. AND WAS GOING TO TAKE CARE OF THE TICKET ITSELF, THE NOL PROSEQUI.

Q AND WHAT HAPPENED THEN?

A SHE ENGAGED IN A CONVERSATION. SHE STARTED OFF TELLING ME ABOUT CAPTAIN BROACH BEING OVER THERE AND TRYING TO GET THE CHARGES

AGAINST HIM DISMISSED. AND SHE WAS VERY FREE ABOUT WHAT SHE WANTED TO TELL ME AT THAT POINT IN TIME. THE MORE SHE TALKED, I GUESS THE MORE UPSET I GOT, BECAUSE I DIDN'T FEEL LIKE IT WAS PROPER FOR HIM TO BE GOING AROUND BEHIND MY BACK TRYING TO DO THIS WHENEVER SHE HAD JUST CAME TO ME. MS. HOWLE HAD JUST CAME TO ME AND ASKED ME ABOUT IT HERSELF.

IN TALKING WITH MS. SOWELL, SHE MADE A COMMENT THAT WHENEVER SHE TALKED TO CAPTAIN BROACH ABOUT IT THAT HE SAID THAT HE HAD SEEN THE TAPE, AND THE BOY WAS DRUNK AS SHIT, EXCUSE ME FOR SAYING THAT. BUT MAYBE THERE WERE SOME OTHER WAYS TO GET AROUND IT. THIS KIND OF BOTHERED ME. IF IT WERE A FRIEND OF MINE, AND I WANTED SOME HELP FOR THEM, I WOULD HAVE WENT DIRECTLY TO THE OFFICER. I WOULDN'T HAVE WENT AROUND BEHIND HIS BACK.

ROBERT P. MACIARIELLO; ARNOLD ROWELL.
Plaintiffs-Appellees,

v.

CITY OF LANCASTER; CITY OF LANCASTER POLICE DEPARTMENT, W.B. SUMNER, Chief of Police, in his individual and official capacity; PAUL S. PASKOFF, Lancaster City Administrator, in his individual and official capacity,
Defendants-Appellants.

No. 91-1268

Appeals from the United States District Court
for the District of South Carolina,
at Columbia.
Joseph F. Anderson, Jr., District Judge.
(CA-90-664-16H, CA-90-664-17)

Argued: April 8, 1992

Decided: August 18, 1992

Before HALL and SPROUSE, Circuit Judges, and KIDD, Senior United States District Judge for the Northern District of West Virginia, sitting by designation.

Reversed and remanded with instructions by published opinion. Judge Hall wrote the opinion, in which Judge Sprouse and Senior Judge Kidd joined.

ARGUED: Vance J. Bettis, GIGNILLIAT, SAVITZ & BETTIS, Columbia, South Carolina, for Appellants. Sharon McCain Rickborn, Columbia, South Carolina, for Appellees. **ON BRIEF**: Linda Pearce Edwards, GIGNILLIAT, SAVITZ AND BETTIS, Columbia, South Carolina, for Appellants.

OPINION

HALL, Circuit Judge:

Robert Maciarello (sic) and Daryl Rowell are former officers of the Lancaster, South Carolina, city police department. They brought this action, alleging two claims under state law and one, alleging an infringement of free speech under 42 U.S.C. § 1983. The defendants are W. B. Sumner, the chief of police; Paul Paskoff, the city administrator; the city; and the police department. Plaintiffs sought money damages only.

Following discovery, all parties moved for summary judgment. The district court granted summary judgment for the defendants on the state law claims, but denied it on the § 1983 claim. The plaintiffs' motion was denied in its entirety. Because their motion was based on qualified immunity, Sumner and Paskoff noted an immediate appeal to this court. On subsequent motion of the defendants, the district court certified for interlocutory

appeal its order denying summary judgment to the city and police department. The district court found that the denial of summary judgment rested on a controlling question of law - whether plaintiff's actions in investigating alleged wrongdoing by their superior officer constituted protected speech - as to which there is substantial ground for difference of opinion, and that immediate appeal may materially advance the termination of the litigation. See 18 (sic) U.S.C. § 1292(b). We then granted leave to appeal, and all defendants are before us. We conclude that Sumner and Paskoff are entitled to qualified immunity and that there is no evidence of a custom of policy of the governmental entitled that caused the supposed constitutional violation. Therefore, we reverse and remand with instructions to enter summary judgment for the defendants.

I.

In May 1987, plaintiff Rowell, then a

Sergeant in the Lancaster force, arrested Shawn Scott for driving under the influence of alcohol. Pursuant to department policy, Scott was videotaped as he took a breathalyzer test. Several weeks, later, Susan Howle, Scott's sister and Rowell's co-worker, asked Rowell to drop the charge against her brother. Intending to comply with this request, Rowell spoke to Municipal Court Judge Helen Sowell. Judge Sowell informed him that Captain Robert Broach, the patrol commander and third in command, had already approached her about the case. Broach had told her that the tape "wasn't any good." Rowell was confident that the tape was in good condition when it was received in the evidence room and he suspected that Broach may have altered it. Rowell reported his suspicion to plaintiff Maciariello, a lieutenant and Rowell's immediate supervisor.

Rowell and Maciariello went to the evidence room to find our whether Broach had

checked our the tape. The supervisor of the evidence room, Captain Bailey, stated that he had given the video to Broach, but the chain of evidence log did not show any such transaction. Rowell and Maciariello then viewed the tape and discovered that there wa only sound, and no picture, recorded.

As a part of larger infighting at the Lancaster department, Maciarello (sic) and Rowell had had a long history of conflict with Broach. Seeing a chance to advance their cause, they decided to conduct an investigation of Broach without reporting their suspicions to the Assistant Chief of Police or the Chief of Police, in whom they had little trust.

At Maciariello's suggestion, Rowell returned to Judge Sowell with a hidden tape recorder. Sowell repeated that she assumed Broach had seen the Scott tape because of statements he had made to her. Rowell told Judge Sowell of his suspicions about Broach.

The judge told Rowell to talk to the city solicitor and to "keep [her] out of this."

Rowell and Maciariello a'so asked a videotape expert whether the picture on a tape could be erased without affecting the sound. They were told that it could be done easily.

In mid-August, Assistant Chief Harris overheard Rowell and Maciariello as they discussed their clandestine activities. After confronting them about the matter. Harris requested that Chief Sumner initiate an internal investigation. Chief Sumner appointed Lieutenant Balkcum of the Detective Division to conduct an internal review. Balkcum's final report concluded that Broach engaged in no wrongdoing. As Rowell and Maciarello (sic) would have quickly learned had they reported their suspicions earlier, the video camera Rowell used to tape the Scott arrest had malfunctioned, and the Scott tape was one of at least six on which there was no picture.

Chief Sumner decided to demote Rowell and

Maciariello for failing to report their suspicions prior to undertaking their "devious" private investigation. Upon learning of their demotions, Rowell and Maciariello went to Paul Paskoff, the City Administrator. After talking with Paskoff, both men placed their badges on his desk and resigned.[1] They filed grievances concerning their demotions. Thought initial hearing board ruled for Rowell and Maciarello (sic), Sumner overruled the board and the Lancaster City Council upheld the demotions.

Nearly three years later, in March, 1990, Rowell and Maciariello filed this action. The only claim before us today is their assertion that their first amendment right to freedom of

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[1]Under city policy, a resignation "in good standing" must be made to an employee's department head; hence, the resignations to Paskoff were unofficial, and the plaintiffs were terminated when they failed to report to work. Though the circumstances of the resignation/termination receive some space in the briefs and a great deal in discovery, neither side has attached any significance to them.

speech was violated by their demotion. In denying summary judgment for Sumner and Paskoff, the district court ruled that the law regarding retaliation for First Amendment activity is clearly established and that the "defense of qualified immunity foes not pertain to this case." Sumner and Paskoff's appeal of the denial of summary judgment is based on qualified immunity, and we have jurisdiction under *Mitchell v. Forsyth,* 472 U.S. 511,530(1985). As we related above, the defendant governmental entities have appealed the same order through § 1292(b) certification.

II.

Governmental officials performing discretionary functions are shielded from liability for money damages so long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

Moreover, there are two levels at which the immunity shield operates. First, the particular right must be clearly established in the law. Second, the manner in which this right applies to the actions of the official must also be apparent. *Tarantino v. Baker*, 825 F.2d 7712, 774-75 (4th Cir. 1987), *cert.denied*, 489 U.S. 1010 (1989). Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Gooden V. Howard County*, 954 F.2d 960, 968 (4th Cir. 1992 (en banc). The *Anderson* Court explained (483 U.S. at 639-40, cite omitted):

> [T]he right to due process of law is quite clearly established by the Due Process Clause, and this there is a sense in which any action that violated that Clause (no matter how unclear it may be that the particular action is a violation)

violated a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiff would be able to controvert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. . . .It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more

> relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless that very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

In light of this rule, the judgment below must be error or paradox. The district court held that the law relating to retaliation against public employees for exercise of free speech was clearly established at the time of plaintiff's demotions. As to the broad proposition of law, we agree.[2] On the other

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[2] The fundamentals of this area of the law were developed in a fifteen-year line of cases, the most notable of which were *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City School*

hand, the premise of the § 1292(b) certification - that reasonable minds may differ over whether Rowell and Maciarello (sic) engaged in protected speech - would, if correct, strongly support Sumner and Paskoff's qualified immunity defense. In any event, the premise may be wrong, and, as plaintiffs argue, their right to be free of discipline for informally investigating a fellow officer may be clearly established; hence, we must examine the merits of the constitutional claim.

III.

A threshold question is whether any of Rowell and Maciariello's actions constituted "speech." Appellants argue that the investigation constituted conduct and not speech. They rely on *Dennison v. County of Frederick*, 921 F.2d 50 (4th Cir. 1990), *cert.denied*, 111 S.Ct. 2828 (1991). In

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Dist. Bd. of Education v. Doyle, 429 U.S. 274 (1977); and *Connick v. Myers*, 461 U.S. 138 (1983)

Dennison, the plaintiff alleged that he was constructively discharged in violation of his First Amendment rights. We held that Dennison's First Amendment right to freedom of speech could not have been violated because there was no particular speech for which he was punished. Instead, he was discharged after a dispute over a general course of conduct. Although we recognized in *Dennison* that "speech" within the meaning of the First Amendment includes more than the spoken or written word, we noted also that not all conduct can be labeled speech just because the actor intends thereby to express an idea. *Id.* at 53-54; *United States v. O'Brien*, 391 U.S. 367 (1968)

We easily conclude that the investigation itself was not "speech." The investigation did not express, and was not intended to express anything to anyone; its central feature was secrecy. Rowell and Maciarello (sic) deliberately chose *not* to speak, and they hid

their activities so that those activities *would not* convey a message to an observer. Though they claim that they intended to speak out eventually, their intention expresses nothing. A hen may intend to lay an egg someday, but the omelet must await it.

In a much more narrow sense, some "speech" undoubtedly occurred. Rowell and Maciariello discussed their suspicions with Judge Sowell and with each other. Speech on matters of public concern is protected even though it occurs in a private setting. *Rankin v. McPherson*, 483 U.S. 378 (1987); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979)[3]

We conclude that the investigative activities per se of Rowell and Maciariello did not constitute "speech," but that they did engage in some protected conduct in discussing

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[3]The plaintiffs also spoke to the video expert and Bailey in conducting their investigation. However, in neither of these conversations was their suspicion of Broach conveyed.

their suspicions with Sowell and one another.

IV.

Though plaintiff's claim, greatly pruned, survives the "speech" test, fatal hurdles await it. The protected speech must have been a "but for" cause of the discharge or demotion. *Jurgensen v. Fairfax County*, 745 F.2d 868, 880 (4th Cir. 1984); *Mr. Healthy*, 429 U.S at 287.

There is no evidence from which a reasonable trier of facts could find that plaintiffs were disciplined for stating their suspicions to one another; instead, they were demoted for not stating their suspicions to someone in authority. Likewise, they were not demoted for revealing the possible evidence tampering to Judge Sowell, but rather for surreptitiously taping a conversation with her.

Although Chief Sumner's demotion letter to Rowell and Maciariello refer to their "allegations" against Broach, this word, in

context, broadly refers to the whole sorry affair. The letters clearly explain that Rowell and Maciariello were being demoted for "unprofessional and devious" conduct. In particular, the recording of Sowell's conversation, conduct that Sumner considered highly unprofessional and an invasion of the judge's privacy, was an important factor in Sumner's decision.

The "speech" here is so limited, and the non-"speech" cause for the discipline so overwhelmingly and lucidly established, that no reasonable trier of fact could find the speech a "but for" cause of the demotions.

V.

Rowell's statement of his suspicions to Judge Sowell is "speech" but not a "but for" cause of the demotions; the larger investigation may be a "but for" cause , but it is not "speech." Even if these defects were repaired, plaintiff would lose if their interest as a citizen in the "speech" is

outweighed by the government's interest as employer. The test for striking this balance was developed in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983).[4]

> [T]he First amendment guarantee of free speech is not absolute. . . particularly so in the case of public employees, since "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."

Jurgensen, 745 F.2d at 878, *quoting Pickering*, 391 U.S. at 568 (1968) (citation omitted).

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[4]This court has had several opportunities to apply the test in the context of public employment since *Connick* was decided. See *Dwyer v. Smith*, 867 F.2d 184 (4th Cir. 1989); *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987); *Jurgensen*, 745 F.2d 868; and *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984).

Consequently, we strive to balance the right of the employee to comment on matters of public interest and the right of the public employer to promote the efficiency of public services. *Id.* at 878-79.

The first step is to determine the extent to which the speech touches on a matter of public concern. We agree with the district court that an allegation of evidence tampering by a high-ranking police officer is a matter in which the public should be interested. However, Rowell and Maciarello's (sic) deposition testimony clearly shows that personal animosity motivated them to undertake the secret investigation. This motivation detracted somewhat from their professed interest in exposing official corruption. *See McMurphy v. City of Flushing*, 802 F.2d 191, 197-98 (6th Cir. 1986) (court properly considered personal vendetta as basis for unauthorized investigation, rather than sincere effort to expose official corruption).

Second, the court must consider "the nature of the employee's job . . . [and the] possible effect of his action on employee morale, discipline or efficiency." *Jurgensen*, 745 F.2d at 880. In this regard, the court must evaluate the employer's interest in maintaining efficiency, integrity and discipline. This interest is viewed as if on a spectrum "from University professors at one end to policemen at the other." *Id.* Police are at the restricted end of the spectrum because they are "paramilitary" - discipline is demanded, and freedom must be correspondingly denied. *Id.*; *Hughes v. Whitmer*, 714 F.2d 1407, 1418 (8th Cir. 1983), cert. denied, 465 U.S. 1023 (1984); *cf. Kelley V. Johnson*, 425 U.S. 238 (1976)(police department's interest in discipline, esprit de corps, and uniformity was sufficient state interest to defeat due process challenge to hair grooming regulations). Consequently, greater latitude is afforded to police department officials in

dealing with dissension in their ranks. *Hughes*, 714 F.2d at 1419.

A police department has an undeniable interest in discouraging unofficial internal investigations. If personal investigations were the usual way for an officer to check out suspicious activities of a fellow officer, the effect on efficiency and morale could be very disrupting and the effectiveness of the police force might deteriorate. Instead of concentrating on their traditional duties in the community, officers with personal hostilities could became preoccupied with personal investigations of one another. Esprit de corps could collapse into a kafkaesque nightmare of improper investigations into the impropriety of improper investigations.

When we balance the competing interests under *Pickering* and *Connick*, we do not require the public employer to prove that the employee's speech actually disrupted efficiency, but only that an adverse effect

was "reasonably to be apprehended." *Jurgensen*, 745 F.2d at 879. In this case, one of the express grounds for the demotions was that "the morale of the Lancaster Police Department has been damaged." Whether there was any concrete evidence that morale was disrupted or not, the potential for disruption is self-evident.

In summary, the unlawfulness of Sumner's and Paskoff's actions was not only not "apparent," but also nonexistent. Consequently, they are entitled to qualified immunity. Though the governmental entities are not entitled to qualified immunity, the underlying conduct was lawful, even if it were not, plaintiffs utterly failed to prove the existence of a custom or policy of the city or police department that caused the underlying conduct. Liability under 42 U.S.C. § 1983 does not extend to the public coffers through mere *respondeat superior*. *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978); *Gordon v.*

Kidd, ___F.2d___(4th Cir. 1992)

For these many reasons, we reverse and remand with instructions to enter summary judgment for the defendants.

Reversed and remanded with instructions.

MEMO TO: Sergeant Arnold D. Rowell

FROM: William B. Sumner, Chief of Police/Fire Department Administration

DATE: October 5, 1987

SUBJECT: Demotion

Pursuant to your request, an investigation regarding allegations you made against Captain Robert L. Broach for evidence tampering was conducted by the Internal Affairs Division of the Lancaster Police Department. An investigation of this nature should have been brought to my attention as the Chief of Police prior to the involvement you had with regard to the allegations made by you. Secondly, and more importantly, the taping of city employees without their consent or knowledge constitutes an invasion of their privacy.

After reviewing the Internal Affairs investigation report regarding your allegations against Captain Broach, I agree with the findings of the report that your conduct in this matter was both unprofessional

and devious.

As a result of your actions, the morale of the Lancaster Police Department has been damaged. Over the past nine months, I have had to counsel you on several occasions.

1. On January 1, 1987, you received a written reprimand for your violation of General Order 86-1, which pertains to pursuits and emergency responses.

2. On or about June 4, 1987, you received oral counseling as a result of your unexcused absence from Municipal Court on Wednesday, June 3, 1987.

3. On September 22, 1987, you were informed of those cases you would need to present at the preliminary hearings to be held on September 28, 1987. In a memorandum dated October 1, 1987, from Court Administrator Helen P. Sowell, I am informed that you failed to appear to testify in your cases at these preliminary hearings.

In light of these reprimands and findings by

the Internal Affairs Division of the Lancaster Police Department regarding your allegations against Captain Robert L. Broach, I have no choice at this time but to demote you from your current rank of Sergeant to that of Patrol Officer. Your salary will also decrease from its current $17,139.00 (16B) to $14,081.00 (12B). Both your demotion and corresponding salary decrease will become effective October 5, 1987.

Any further unprofessional conduct on your part will result in your immediate termination from employment with the City of Lancaster.

WBS:jb

Signed.

MEMO TO: Lieutenant Robert P. Maciariello

FROM: William B. Sumner, Chief of Police/Fire Department Administration

DATE: October 5, 1987

SUBJECT: Demotion

An investigation regarding allegations brought by Sergeant Arnold Rowell against Captain Robert L. Broach for evidence tampering was conducted by the Internal Affairs Division of the Lancaster Police Department. An investigation of this nature should have been brought to my attention as the Chief of Police prior to the involvement you had with regard to the allegations made by Sergeant Rowell. Secondly, and more importantly, the taping of city employees without their consent or knowledge constitutes an invasion of their privacy.

After reviewing the Internal Affairs investigation report regarding Sergeant Rowell's allegations against Captain Broach, I agree with the findings of the report that

your conduct in this matter was both unprofessional and devious.

As a result of your actions, the morale of the Lancaster Police Department has been damaged. Over the past nine months, I have had to counsel you on several occasions.

1. On January 8, 1987, you received a written reprimand for failure to follow a directive and showed poor attitude in your failure to obtain budget information form your shift after I had requested this information from each watch commander. It is noted in the written reprimand you received dated January 28, 1987, that "future occurrences may result in demotion."

2. On February 5, 1987, you were counseled by me for your use of profanity with a citizen.

3. On August 31, 1987, I counseled you regarding a complaint made by a citizen regarding your unprofessional attitude in dealing with this citizen. In my memorandum to your dated August 31, 1987, I agreed with the

Internal Affairs Investigation report that you verbally abused this citizen and your actions were unprofessional.

4. On September 22, 1987, you were informed of those cases you would need to present at the preliminary hearings to be held on September 28, 1987. In a memorandum dated October 1, 1987, from Court Administrator Helen P. Sowell, I am informed that you railed to appear to testify in your cases at these preliminary hearings.

In light of these reprimands and findings by the Internal Affairs Division of the Lancaster Police Department regarding your involvement in the allegations brought by Sergeant Rowell against Captain Robert L. Broach, I have no choice at this time but to demote you from the rank of Lieutenant to the rank of Corporal. Your current salary of $19,822.00 (18C) will also be reduced to $15,537.00 (14B). Both your demotion and corresponding salary decrease will become effective October 5, 1987.

Any further unprofessional conduct on your part will result in your immediate termination from employment with the City of Lancaster.

WBS:jb

(2)

No. 92-876

Supreme Court, U.S.
FILED
DEC 17 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

ROBERT P. MACIARIELLO and ARNOLD ROWELL,

Petitioners,

vs.

CITY OF LANCASTER, CITY OF LANCASTER POLICE DEPARTMENT, W.B. SUMNER, CHIEF OF POLICE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, PAUL S. PASKOFF, LANCASTER CITY ADMINISTRATOR, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the actions of police officers in conducting a two-month secret and unauthorized investigation of a superior officer and their actions in failing to report for two months suspected evidence tampering by a superior officer constitute speech on a matter of public concern entitling them to First Amendment protection?

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STATUTES AND CONSTITUTIONAL PROVISIONS

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No. 92-876

In The

Supreme Court of the United States

October Term, 1992

ROBERT P. MACIARIELLO and ARNOLD ROWELL,

Petitioners,

vs.

CITY OF LANCASTER, CITY OF LANCASTER POLICE DEPARTMENT, W.B. SUMNER, CHIEF OF POLICE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, PAUL S. PASKOFF, LANCASTER CITY ADMINISTRATOR, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents herein respectfully request that petitioners' request for a writ of certiorari to the Fourth Circuit Court of Appeals be denied.

OPINIONS BELOW

The opinion of the District Court of South Carolina (Petitioners' Appendix 4a-14a) is not officially reported.

The opinion of the Fourth Circuit Court of Appeals (Petitioners' Appendix 36a-57a) is reported at 973 F.2d 295 (4th Cir. 1992).

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on August 18, 1992. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1983 and the First Amendment to the Constitution of the United States. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

COUNTER STATEMENT OF THE CASE[1]

Statement of Facts

The City of Lancaster is a municipality of about 10,000 residents and employs a police force of approximately 35 sworn officers. Robert Maciariello and Daryl Rowell were employed as police officers. Maciariello was hired in 1978 and Rowell in 1981. Both received several promotions and, at the time they resigned in 1987, Maciariello was a shift lieutenant and Rowell was the sergeant on Maciariello's shift.

The events leading to their demotions began in May 1987. On or about May 1, 1987, Rowell arrested a Shawn Scott for driving under the influence. Pursuant to department policy Scott took a breathalyzer test and was videotaped. (J.A. 247:4-24). Several weeks later, at the request of Susan Howle (Scott's sister and Rowell's co-worker), Rowell decided to *nol pros* Scott's case. (J.A. 250:15 – 253:17). Around this time Rowell learned that the Scott videotape was defective in that it contained no picture, just audio. (J.A. 257:6 – 259:21). Rowell theorized that

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[1] References to the Joint Appendix below are noted "J.A. page:line(s)."

Captain Robert Broach, the department's patrol commander and third in command, tampered with the Scott video. The basis for Rowell's assumption was his unsubstantiated belief that Broach was infatuated with Howle (J.A. 275:10-23) and that Broach altered the videotape in the hopes of assisting Scott in getting the charges dropped, thus endearing himself to Howle. (J.A. 92:8-20).

Instead of reporting their suspicions to internal affairs, the Assistant Chief of Police, the Chief of Police, or anyone else in authority, Maciariello and Rowell decided to conduct an "investigation." It was not until mid-August that the department learned that Maciariello and Rowell were "investigating" Robert Broach for alleged evidence tampering.

On or about August 16, 1987, Assistant Chief Harris overheard someone talking about the secret investigation. (J.A. 67; 82:25 – 83:3). He called Maciariello and Rowell into his office and asked them to explain to him what they were doing. Harris reported this meeting to Chief Sumner, who then concluded that the department should conduct an internal investigation into the suspected evidence tampering. (J.A. 36:8-17). Sumner appointed Lt. Balkcum of the detective division to complete the internal review.[2]

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[2] Captain Bailey, head of the detective division, could not conduct the investigation because of a conflict of interest. (J.A. 57-58). Bailey was in charge of the evidence room and stated that he had given Broach the Scott videotape to review. However, Broach denied viewing the tape and the chain of custody card did not show that Broach had checked out the tape. (J.A. 79:20-23).

Balkcum took statements from all City employees involved in any way with the Shawn Scott case. As part of the investigation Captain Broach took a polygraph examination at the South Carolina Law Enforcement Division (SLED). Balkcum reported that the polygraph results were conclusive that Broach was telling the truth when he stated that he did not tamper with the Scott video. Balkcum's final report (J.A. 30-35) cleared Broach of any wrongdoing.

Sumner was disturbed that two of his officers had conducted an investigation of a superior officer for evidence tampering without reporting their suspicions to anyone in authority. It was his belief that if Broach, who was then the patrol commander and third in command in the police department, had tampered with evidence then the Chief needed to know. (J.A. 412:8-13). For two months Maciariello and Rowell conducted an investigation of a superior officer, their patrol commander. As part of their unauthorized investigation they surreptitiously tape recorded a conversation with a municipal judge. (J.A. 264:22 – 265:21). It was not until Harris, the Assistant Chief, overheard someone talking about the "investigation" and confronted Maciariello and Rowell that they came forward with their suspicions.[3]

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[3] In their petition, petitioners assert, incorrectly, that they reported their suspicions to Captain Bailey. (Petition at p. 14). However, Captain Bailey's affidavit (Petitioners' Appendix 30a – 32a) specifically states that he first spoke to Maciariello and Rowell about their investigation in September, one month *after* Chief Sumner and Assistant Chief Harris learned of the secret investigation.

Sumner decided that Maciariello and Rowell should be demoted for their failure to report the alleged evidence tampering to him and for conducting an unauthorized investigation. He met personally with each one on Monday, October 5, 1987, to give them his decision. (J.A. 36; 37; 395:14-18).

Immediately upon learning of their demotions Maciariello and Rowell went to see Paul Paskoff, the City Administrator. After talking with Paskoff for approximately forty-five minutes, Maciariello and Rowell placed their badges on his desk and told him that they did not need their jobs with the City. Both admitted that it was their intention to resign and not return to work for the City when they placed their badges on Paskoff's desk. (J.A. 105:25 – 106:6; 287:3 – 288:7).

According to City policy, however, in order to resign in good standing an employee must resign to his department head and give two weeks notice. (J.A. 432:6-18). On Thursday, October 8, 1987, after Maciariello and Rowell failed to report to work, Sumner notified them that they were no longer employed with the City. (J.A. 38; 39).

Despite their resignations, Maciariello and Rowell filed grievances over their demotions. (J.A. 40-41; 42). Sumner responded. (J.A. 43; 44). The grievance committee recommended that the demotions be reversed. (J.A. 47; 48). City Council decided to reject the grievance committee's recommendation and accepted Paskoff's recommendation that the demotions be upheld.[4] Maciariello and

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[4] The City of Lancaster is governed by a Council form of government pursuant to South Carolina Code of Laws § 5-1-10,

Rowell were notified by letter that City Council denied their grievances concerning their demotions. (J.A. 52; 53).

Proceedings in the District Court and Fourth Circuit

Maciariello and Rowell filed suit in March 1990 alleging three causes of action: 1) violations of their First and Fourteenth Amendment rights to freedom of speech; 2) outrageous conduct; and 3) violation of the public policy of the State of South Carolina.

The defendants – Chief Sumner (Sumner), City Administrator Paskoff (Paskoff), the City of Lancaster (City), and the Lancaster Police Department (Department) – answered the complaint on April 18, 1990. On December 19, 1990, they filed a motion for summary judgment as to all three causes of action. By Order entered January 31, 1991, the court granted the motion as to the claim for outrageous conduct and denied the motion as to the remaining claims.

On July 24, 1991, in response to recent legal developments, the defendants renewed their motion for summary judgment as to the remaining causes of action. Maciariello and Rowell responded and filed a cross-motion for summary judgment on August 12, 1991. In an Order entered on October 7, 1991, the court denied both parties' motions for summary judgment as to the First Amendment claim. The court also ruled that Sumner and Paskoff

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et seq. South Carolina Code of Laws § 8-17-140 provides that final determination for grievance matters rests with the governing body, in this case, City Council.

were not entitled to the defense of qualified immunity on the First Amendment claim.

Sumner and Paskoff appealed the qualified immunity issue by filing a Notice of Appeal on October 17, 1991. Sumner, Paskoff, the City, and the Department filed a Motion to Amend Interlocutory Order on October 17, 1991, pursuant to 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5(a). By Order entered on November 25, 1991, the district court amended its Order and certified the free speech issue to the Fourth Circuit. The defendants filed a Petition to Appeal Interlocutory Order on November 25, 1991, and the Fourth Circuit granted the Petition on December 31, 1991.

The court of appeals held that Maciariello and Rowell's secret and unauthorized investigation *per se* was not speech. The court recognized, however, that certain components of the employees' investigation were speech, specifically, their conversations with each other and with City Judge Sowell. The court proceeded to determine whether the speech components of the employees' investigation was the "but for" cause of their demotions and concluded that they were not. The unanimous panel further reasoned that *even if* the investigation were speech and *even if* the investigation were the "but for" cause of the demotions, Maciariello and Rowell's First Amendment rights were nevertheless not violated because their interest in this speech was outweighed by the defendants' interest in promoting efficiency, discipline and integrity within the police department.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision that the petitioners' actions in conducting an unauthorized and secret investigation of a superior officer and their failure to report their suspicions is not protected speech, is a narrow holding which is limited to the facts in this case.

Furthermore, despite petitioners' argument to the contrary, there is no conflict among the circuits on the points of law raised by petitioners. The Eighth Circuit decision cited by petitioners is easily distinguished from the instant case and, in any event, the final conclusion of the two circuits is identical.

The Fourth Circuit did not misapply the *Mt. Healthy* balancing test in requiring the petitioners to show that "but for" their protected activity they would not have been demoted. The "but for" standard is not a higher standard, as petitioners contend, and this Court has previously held that the standard enunciated in *Mt. Healthy* is "but for."

Finally, petitioners failed to respond to the Fourth Circuit's ultimate conclusion that even if petitioners' investigation were "speech," and even if this "speech" were the "but for" reason for their demotions, the interests of the Police Department outweighed the interests of the petitioners.

The Fourth Circuit's analysis and ultimate conclusion accords with both its own precedent and this Court's precedent. The petition for writ of certiorari should, therefore, be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT A SECRET AND UNAUTHORIZED INVESTIGATION OF A POLICE OFFICER BY SUBORDINATES IS NOT, IN AND OF ITSELF, SPEECH UNDER THE FIRST AMENDMENT.

As petitioners concede, no court has ever held that an unauthorized and secret investigation of one police officer within a department by a subordinate police officer within that same department in and of itself constitutes speech under the First Amendment. The Fourth Circuit did not, as petitioners argue, hold that petitioners' unauthorized investigation of their patrol commander was not speech because the speech was privately communicated. The court held that the investigation itself was not speech because it

> . . . did not express, and was not intended to express, anything to anyone; its central feature was secrecy. Rowell and Maciariello deliberately chose *not* to speak, and they hid their activities so that those activities *would not* convey a message. Though they claim that they intended to speak out eventually, their intention expresses nothing.

973 F.2d at 299. (emphasis in original).

The Fourth Circuit's holding that the investigation itself was not "speech" is supported not only by logic but also by the decisions of other courts of appeal. *Dennison v. County of Frederick, Va.*, 921 F.2d 50 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2828 (1991); *Terrell v. University of Texas System Police*, 702 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987); *Guillory v. St. Landry Parish Police Jury*,

802 F.2d 822 (5th Cir. 1986), *cert. denied,* 482 U.S. 916 (1986). The Fourth Circuit's holding is not in conflict with any of this Court's decisions, and petitioners' rhetorical excesses do not change that fact.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IN *HUGHES V. WHITMER.*

Petitioners argue that this Court should grant certiorari because the Fourth Circuit's decision is in conflict with the Eighth Circuit's decision in *Hughes v. Whitmer,* 714 F.2d 1407 (1983), *cert. denied,* 465 U.S. 1023 (1984). They are wrong. There is no conflict between the two decisions.[5] In suggesting otherwise, petitioners simply have conveniently overlooked a critical factual distinction.

In *Hughes,* the plaintiff state trooper alleged that he had been transferred in retaliation for, *inter alia,* accusing a fellow trooper's son of drug trafficking and in retaliation for conducting an investigation into the son's alleged drug trafficking. Hughes told his troop commander of his suspicions and secured the troop commander's authorization to conduct the investigation of his colleague's son. 714 F.2d at 1411. It was in this factual context that the Eighth Circuit referred to Hughes's "accusations and investigations" as "speech-related." *Id.* at 1421.

Unlike Hughes, petitioners investigated their commander, not his child. Moreover, petitioners did not report their suspicions about their commander to the

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[5] The Fourth Circuit was aware of *Hughes* and in fact, cites *Hughes* in part v of the opinion. 973 F.2d at 300.

chief, assistant chief, city administrator or anyone else in authority. Unlike Hughes, they did not seek or obtain permission from anyone in authority to investigate Captain Broach. Indeed, if Assistant Chief Harris had not overheard a conversation and confronted petitioners two months *after* they began their rogue investigation, their investigation and the possible evidence tampering by their superior might not ever have come to light.

Thus, petitioners' assertion that the Fourth Circuit's decision conflicts with the Eighth Circuit's decision in *Hughes* does not withstand scrutiny. *Hughes* does not stand for the proposition that a police officer's unauthorized and clandestine investigation of a superior officer constitutes protected speech. Not surprisingly, petitioners have cited no case that does stand for such a proposition.

III. THE COURT OF APPEALS DID NOT MISAPPLY THE CAUSATION STANDARD SET FORTH IN *MOUNT HEALTHY CITY SCHOOL DISTRICT BD. OF EDUC. V. DOYLE.*

Petitioners fault the Fourth Circuit for misapplying the causation standard enunciated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The court of appeals, after acknowledging that petitioners' speech to City Judge Sowell and each other during the course of their unauthorized investigation of Captain Broach constituted "speech," declared that under *Mt. Healthy*, "the protected speech must have been a 'but for' cause of the discharge or demotion." 973 F.2d at 299. Petitioners argue that *Mt. Healthy* does not require a showing of "but for" causation. They argue that "a

motivating factor" – the term used in *Mt. Healthy* – is something less than "but for."

Petitioners are simply wrong. This Court held in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), that the ultimate inquiry is indeed whether "*but for*" a public employee's protected speech, the employee would have been retained. 439 U.S. at 417. (emphasis original). As the Court explained in *Givhan*, any lesser standard "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 439 U.S. at 416, quoting *Mt. Healthy*, 429 U.S. at 285.

Thus, the Fourth Circuit's statement of the causation standard in "but for" terms does not conflict with *Mt. Healthy*. Indeed, the Fourth Circuit has consistently couched the causation requirement in First Amendment cases in "but for" terms. *See Huang v. Bd. of Governors of the Univ. of North Carolina*, 902 F.2d 1134, 1140 (4th Cir. 1990); *Daniels v. Quinn*, 801 F.2d 687, 689 (4th Cir. 1986); *Johnson v. Town of Elizabethtown*, 800 F.2d 404, 406 (4th Cir. 1986); *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 878 (4th Cir. 1984).

IV. PETITIONERS DO NOT RESPOND TO THE HOLDING OF THE COURT OF APPEALS THAT RESPONDENTS' INTEREST IN MAINTAINING DISCIPLINE, INTEGRITY AND EFFICIENCY OUTWEIGHED PETITIONERS' INTEREST IN CONDUCTING AN UNAUTHORIZED AND SECRET INVESTIGATION, AND SUCH HOLDING IS AN INDEPENDENT BASIS FOR SUPPORTING THE FOURTH CIRCUIT'S DECISION.

Petitioners fail to point out that the court of appeals assumed for the sake of argument that petitioners' investigation and conversation with each other was "speech" and that this speech was the effective cause of their demotions. Nevertheless, the court held, the speech was not protected because petitioners' interest in this speech was outweighed by the respondents' interest in maintaining efficiency, integrity and discipline within the police department. 973 F.2d at 300. Petitioners do not seek review of this determination which provides an independent basis supporting the judgment of the court of appeals.

The court of appeals correctly noted that personal animosity motivated petitioners to undertake their unauthorized investigation of Captain Broach and that this motivation detracts from their claim that their speech related to a matter of public concern. 930 F.2d at 300, *citing McMurphy v. Flushing*, 802 F.2d 191, 197-98 (6th Cir. 1986); *accord, Breuer v. Hart*, 909 F.2d 1035, 1038-39 (7th Cir. 1990); *Joyner v. Lancaster*, 815 F.2d 20, 23-24 (4th Cir. 1987), *cert. denied*, 484 U.S. 830 (1987). The court further noted that a public employer's interest in maintaining efficiency, integrity and discipline within its police

department requires that a police officer's First Amendment rights be correspondingly restricted. 973 F.2d at 300, *citing Jurgensen v. Fairfax County*, 745 F.2d 868, 880 (4th Cir. 1984); *Hughes v. Whitmer*, 714 F.2d 1407, 1418 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); and *Kelly v. Johnson*, 425 U.S. 238 (1976). The court of appeals properly concluded that the respondents' interest in maintaining efficiency, discipline and integrity within the police department outweighed petitioners' interest in secretly speaking about and investigating Captain Broach.

To determine whether speech on a matter of public concern is protected such that a public employee cannot be disciplined for the speech, a court must balance the employee's interest in speaking as he did against the employer's interest in maintaining and promoting integrity, discipline and efficiency. *Connick v. Meyers*, 461 U.S. 138, 150-151 (1983). When close working relationships are required between subordinates and superiors, an employer's judgment that the speech at issue would disrupt those close working relationships and impede discipline and efficiency is entitled to "a wide degree of deference." *Id.* at 151-152.

Police departments, preeminently among government offices, require close working relationships between superior and subordinate. *Breuer v. Hart*, 909 F.2d 1035, 1041 (7th Cir. 1990); *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989); *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987); *Hughes v. Whitmer*, 714 F.2d 1407, 1419-20 (8th Cir. 1983). That an unauthorized secret investigation of a superior by a subordinate police officer has the potential

for serious disruption of the integrity, efficiency and discipline of a small municipal police department is obvious. As the Fourth Circuit observed:

> A police department has an undeniable interest in discouraging unofficial internal investigations. If personal investigations were the usual way for an officer to check out suspicious activities of a fellow officer, the effect on efficiency and morale could be very disrupting and the effectiveness of the police force might deteriorate. Instead of concentrating on their traditional duties in the community, officers with personal hostilities could become preoccupied with personal investigations of one another. Esprit de corps could collapse into a kafkaesque nightmare of improper investigations into the impropriety of improper investigations.

973 F.2d at 300.

The Fourth Circuit correctly weighed the competing interests of petitioners and respondents and found that the respondents' interest in discipline, integrity and efficiency within the ranks of the police department outweighed petitioners' interest in conducting an unauthorized secret investigation of their patrol commander. As the court noted, *Connick* does not require a showing of actual destruction of close working relationships or actual disruption of discipline and efficiency. 461 U.S. at 152. That such destruction and disruption are reasonably to be apprehended as a result of petitioners' actions is apparent.

Accordingly, for the reasons given by the court of appeals, petitioners' First Amendment claim fails even if their secret investigation of their patrol commander were

protected speech and the "but for" cause of their demotions.

CONCLUSION

Rule 10 of the Rules of the Supreme Court states in pertinent part, "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." There are no special and important reasons for reviewing the Fourth Circuit's disposition in this case. Although petitioners argue that the unanimous opinion of the panel was fundamentally flawed, their failure to petition for rehearing or rehearing *en banc* belies their argument. The petition should be dismissed.

Respectfully submitted,

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December 17, 1992